In our opinion this was indeed a proper case for summary judgment and accordingly allowed the appeal with costs here and below.

Appeal allowed.

Solicitors: *Mahinder Singh Dulku & Co; Skrine & Co.*

Reported by *Prof Ahmad Ibrahim*

Ng Yiu Kwok and Ors v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) - CRIMINAL APPEAL NOS 13, 14, 15, 16, 17, 18 AND 19 OF 1985
HASHIM YEOP A SANI CJ (MALAYA), HARUN HASHIM AND MOHAMED YUSOFF SCJJ
7 JULY 1989

Criminal Law - Dangerous drugs -Trafficking in - Abetment - Remarks made by learned trial judge - Whether he should disqualify himself - Investigation carried on by prosecution during the course of the trial - Admissibility of exhibits without makers being called - Makers refusing or unwilling to come to Malaysia to give evidence - Conviction and sentence of accused - Dangerous Drugs Act 1952, s 39B

Criminal Procedure - Dangerous drugs - Trafficking in - Remarks made by learned trial judge - Whether he should disqualify himself - Investigation carried on by prosecution during the course of trial - Admissibility of evidence

Evidence - Admissibility of exhibits without makers being called - Makers refusing or unwilling to come to Malaysia to give evidence - Evidence Act, s 32

This was an appeal against the conviction of and sentence imposed on the first, second, third, fourth and fifth appellants for trafficking in dangerous drugs and the sixth, seventh, eighth and ninth appellants for abetment. The first, second, third, fourth and fifth appellants were detained at the check-in counter of Singapore Airlines at Bayan Lepas International Airport Penang. Each of them had checked in for a flight to Singapore and a connecting flight to Brussels. On examination by the police it was discovered that each of the suitcases found on the appellants had false plastic bottoms and in the secret compartments were packets containing whitish substance which on subsequent examination and analysis by the chemist was shown to be heroin. The chemist found all the search compartments in the suitcases carried by the five appellants were similarly constructed. A false plastic layer was attached to the bottom of each of the suitcases which could be removed and replaced. Later the police also arrested the sixth, seventh, eighth and ninth appellants at the airport. The learned trial judge found the first, second, third, fourth and fifth appellants guilty on the charge of trafficking in dangerous drugs and sentenced each of them to death. He also found the seventh, eighth and ninth appellants guilty of abetment and also sentenced each of them to death. He found the sixth appellant also guilty of abetment but in the circumstances sentenced him to life imprisonment and eight strokes of the rotan. In the appeal it was argued, inter alia, (1) that because of remarks made by the trial judge in open court the learned trial judge should have disqualified himself; (2) that the learned judge erred in holding that the prosecution was not wrong in carrying on with the investigation during the course of the trial; (3) that the learned trial judge should not have accepted the evidence of the chemist because in his grounds of decision he said he had to accept the evidence of the chemist because of lack of cross-examination; (4) the learned trial judge was wrong in admitting exhibits including bills for hotel rooms in Bangkok although the makers of them were not called to give evidence.

Held, allowing the appeal of the sixth defendant and dismissing the other appeals:

(1) The learned judge was correct in not disqualifying himself as he had satisfactorily explained the remarks made by him.

(2) The so-called investigation was in fact for the limited purpose of procuring witnesses to tender certain exhibits in court which exhibits were already in the possession of the prosecution and they had already by then been tendered in court for identification. The court should only be concerned with evidence to see if they are admissible, not when or how such evidence was obtained.

(3) It was correct for the learned judge to accept the evidence of the chemist because it was clear from the notes of proceedings that the chemist was a qualified and experienced chemist and the instructions given to him by the police were clear and his findings were specific.

(4) It appeared quite clear in this case that the documents which were admitted, were made in the course of the business of the hotel. The makers of the documents were outside the jurisdiction and unwilling to come to this country. The documents were produced by a person responsible for their safekeeping. In a situation like this, where the documents were prepared in the course of business and the makers were outside the jurisdiction who refused or were unwilling to come to this country, all the court should need to satisfy the requirement of s 32(b) of the Evidence Act was that there was some evidence to show that the makers' attendance could not be procured without delay or expense which the court considered unreasonable under the circumstances. There was sufficient evidence to that effect in this case.

(5) There was sufficient evidence to justify the learned judge to call for the defence in respect of the first, second, third, fourth and fifth appellants. The presumption in s 37(d) of the Dangerous Drugs Act was properly invoked because the drugs were found in the suitcases in the custody and control of the respective appellants.

(6) As regards the seventh, eighth and ninth appellants there was sufficient evidence of close interactions and positive acts between the first, second, third, fourth and fifth appellants and the seventh, eighth and nine appellants to constitute the offence of abetment required under s 33 of the Dangerous Drugs Act. The learned judge was correct in calling for the defence of the seventh, eighth and ninth appellants at the close of the prosecution's case.

(7) As regards the sixth appellant there was insufficient evidence of abetment at the close of the prosecution's case. He should not therefore have been called for his defence.

(8) The evidence of the appellants did not raise a reasonable doubt on the prosecution's case and their convictions must

be upheld. There was no reason to interfere with the sentences imposed on them.

Cases referred to

1 *Mahbub Shah* v *King Emperor* [1945] LR 72 IA 148 (refd)
2 *PP* v *Tan Hock Hai* [1983] 1 MLJ 163 (refd)
3 *Sim Tiew Bee* v *PP* [1973] 2 MLJ 200 (folld)

Legislation referred to

Dangerous Drugs Act 1952 ss 33, 37(d) and 39(B)
Evidence Act s 32(b)

Kumaraendran for the first appellant in SCCA No 13/85.
Karpal Singh for the second appellant in SCCA No 13/85, for the appellants in SCCA No 14/85 and 19/85 and for the respondent in SCCA No 17/85.
V Sithambaram for the appellant in SCCA No 15/85.
R Rajasingam for the appellant in SCCA No 16/85 and 18/85, in SCCA Nos 13, 14, 15, 16, 18 and 19 of 1985.
Abdul Hamid bin Mohd (Deputy Public Prosecutor) for the respondent; and for the appellant in SCCA No 17/85.

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): On 30 October 1982 on information received the police laid an ambush at the Bayan Lepas International Airport, Penang for drug couriers. The specific target was the check-in counter of the Singapore Airlines ('SIA'). At 4.40pm the SIA traffic clerk on duty informed the police that a couple of passengers had just checked in with their suitcases for SIA flight SQ193 to Singapore and a connecting flight SIA SQ22 to Brussels. The two passengers were the first appellant and the second appellant. A few minutes later the third appellant and the fourth appellant were picked up with their suitcases on the weighing scale of the SIA check-in counter, also for the same flight to Singapore en route to Brussels. Soon thereafter the fifth appellant was also arrested with another suitcase at the check-in counter.

On examination by the police it was discovered that each of the suitcases found on all the appellants had false plastic bottoms and in the secret compartments were packets containing whitish substance which in subsequent examination and analysis by the chemist was shown to be heroin.

The chemist (PW27) found all the secret compartments in all the suitcases carried by the five appellants were similarly constructed. A false plastic layer was attached to the bottom of each of the suitcases which could be removed and replaced. In the same evening at the airport the police also arrested the sixth, seventh, eighth and ninth appellants.

Apart from the packets containing the heroin found in the suitcases, the police also recovered personal belongings and luggages belonging to the sixth, seventh, eighth and ninth appellants and these exhibits, which included photographs, hotels room receipts and credit card vouchers, became important exhibits in the subsequent trial.

The police investigation at the Bayan Lepas Airport police station proceeded into the early hours of 31 October 1982. After that all the appellants were detained in various lock-ups in Penang. They were subsequently charged in court.

The first five appellants were charged under s 39(B)(1)(a) of the Dangerous Drugs Act 1952 ('the Act') punishable under s 39B(2) of the Act for trafficking in dangerous drugs, to wit, the various amounts of heroin found in the secret compartments of their respective suitcases. The total amount of dangerous drugs found in all the five suitcases was 12,759 g of heroin.

The sixth, seventh, eighth and ninth appellants were jointly charged for abetment under s 33 and s 39B(1)(a) of the Act also punishable under s 39B(2) of the Act.

The learned judge of the High Court on application ordered a joint trial for all the nine appellants.

Evidence was led by the prosecution to show the movements of all the appellants from the time they left Hong Kong until the time they were arrested at the Bayan Lepas International Airport, Penang on 30 October 1982.

The case against the first five appellants was straightforward and factual and depended mainly on the testimonies of the police officers who effected the arrest and the chemist (PW23, PW24, PW27). The case against the sixth, seventh, eighth and ninth appellants was based wholly or substantially on circumstantial evidence which included evidence of payment of travelling and hotel expenses.

At the end of a lengthy trial (from 10 September 1984 to 7 May 1985) the judge convicted all the appellants.

In his judgment the learned judge stated that there was overwhelming evidence against the first five appellants that the dangerous drugs were found in their possession, custody and control and the amount invoked the presumption of trafficking in dangerous drugs. The learned judge did not accept the contention that they were innocent carriers of the suitcases containing the drugs. He found that the circumstances clearly showed that because of the very substantial amount and weight of the drugs they would have been aware of the presence of the drugs in the suitcases and had taken the risk on expectation of the substantial reward had they not been arrested. The learned judge also dismissed any question of degree of culpability among the five appellants.

Based on the evidence and the circumstances of the case the learned judge found the sixth, seventh, eighth and ninth appellants had committed the offence of abetment in furtherance of their common intention within the principles laid down in *Mahbub Shah* v *King Emperor*.[1]

In the light of what the learned judge considered to be overwhelming evidence against the first five appellants he

found no extenuating circumstances to justify him to exercise a discretion in the matter of sentencing. Following the guidelines laid down in *PP* v *Tan Hock Hai*[2] the learned judge passed the death sentence against all the five appellants.

In the case of the seventh, eighth and ninth appellants the learned judge also found that they had not shown any extenuating circumstances to persuade him to impose a life sentence and accordingly also passed the death sentence against them. In the case, however, of the sixth appellant the learned judge stated that the appellant's involvement was only to escort the first and second appellants from Bangkok to Haadyai and thereafter by taxi to Penang. Neither was the sixth appellant, according to the learned judge, a financier of the group. In the circumstances he felt that there were good grounds for him to exercise his discretion to impose a lighter sentence and accordingly ordered a sentence of life imprisonment and eight strokes of the rotan against the sixth appellant.

In the consolidated appeals before us all the nine appellants challenged the decision of the learned judge on various grounds. Some of these grounds were common grounds to all the appellants. We will deal only with some of the more important grounds.

The first common ground dwelt on the question whether the learned judge should have disqualified himself after admitting making certain remarks in open court. A note on this event appeared at p 281 of the appeal record where it is recorded that an application was made by Mr Karpal Singh on behalf of the first, second and sixth appellants that the learned judge should disqualify himself. Mr Karpal Singh said he had instructions from his clients that due to certain remarks made by the learned judge his clients felt that he had prejudged their guilt. It was submitted by Mr Karpal Singh that the tone of the voice of the learned judge when making those remarks 'appeared to be cynical' and that the appellants felt that they could not get justice or a fair trial.

We were of the view that the learned judge was correct in not disqualifying himself as he had satisfactorily explained those remarks. However we agreed with Mr Karpal Singh that a judge should not pass remarks which might cause anxiety to an accused person before him. In this case we have examined and considered every aspect of the complaint and did not think that the judge was in any way prejudiced and there had certainly not been any miscarriage of justice in that regard.

Mr Karpal Singh also challenged the finding of the learned judge that it was not wrong for the prosecution to carry on with the investigation during the course of the trial. This issue arose out of the investigation relating to certain exhibits which were documents consisting of bills in respect of hotel rooms, copy of visa voucher and registration card of a hotel in Bangkok, Thailand. DSP Ramalingam (PW24) commenced investigation of this case on the date of the arrest. After the trial had commenced on 11 September 1984 DSP Ramalingam was instructed to go to Bangkok to carry out further investigation into the case. He carried out an investigation into the initials appearing on one of the exhibits and found that the maker of the initial 'CW' had since left the employment of the hotel in question. Another initial 'OIL' was found to be that of a female typist who had also left the services of the hotel. Both these persons were unable and unwilling to come to this country to testify.

We were of the view that there was no basis for Mr Karpal Singh's objection. We noted that this so-called investigation was in fact for the limited purpose of procuring witnesses to tender certain exhibits in court which exhibits were already in the possession of the prosecution and that they had in fact already by then been tendered in court for identification (ID46, ID47 and ID48).

The court should only be concerned with evidence to see if they are admissible, not when or how such evidence were obtained.

The other issue raised on behalf of all the appellants was that the learned judge should not have accepted the evidence of the chemist, PW27. This objection arose because in his grounds of decision the learned judge said that he had to accept the evidence of the chemist because of the lack of cross-examination. On perusing the grounds of decision of the learned judge we disagreed that this was the real ground for his accepting the evidence of the chemist. The chemist (PW27) had more than ten years experience in his work and when he examined the exhibits given to him by the police he was very specific in his findings. He carried out a qualitative analysis of the samples and found each sample to contain heroin. Then he proceeded to get a quantitative estimation of the samples and found that packet 'E' contained 2,525 g of heroin; packet 'F' contained 2,535 g of heroin; packet 'G' contained 2,594 g of heroin; packet 'H' contained 2,575 g of heroin and packet 'I' contained 2,530 g of heroin.

We were of the view that it was correct for the learned judge to accept the evidence of the chemist because it was clear from the notes of proceedings that the chemist was a qualified and experienced chemist and the instructions given to him by the police were clear and his findings were specific.

The next point raised on behalf of the appellants was the admissibility of exhibits P7, P8, P9, P11 and P46. P7, P9, P11 and P46 were bills for hotel rooms while P8 was an American Express voucher in the name of the eight appellant. P7, P8, P9 and P11 were tendered by PW1, the assistant front office manager of Bangkok Palace Hotel. He was not the maker of the document as he started

employment in the hotel only from 1 March 1983. He kept the records of guests who had stayed in the hotel. According to him he had to keep a record of guests for a period of ten years under the law in Thailand for the purpose of accounting and also for police purposes.

On 14 September 1984 after a trial-within-a-trial on the question of admissibility of P46, being bills dated 27 October 1982 for hotel rooms, P47 being visa card voucher in the name of the ninth appellant and P48 where the makers of these documents were not called by the prosecution to prove the documents, the learned judge ruled that ID46 was inadmissible because he was not satisfied that attempts had been made to trace the maker of the document. However subsequently on 15 January 1985 he reversed his previous ruling and admitted P46 in evidence.

Where a document is made in the ordinary course of business and the maker of which is dead or cannot be found or whose attendance cannot be procured without unreasonable delay or expense the admission of such document is governed by s 32(b) of the Evidence Act.

In *Sim Tiew Bee* v *PP*[3] the Federal Court was dealing with a reference under s 66 of the Courts of Judicature Act. The question posed to the Federal Court concerned the admissibility or otherwise of certain documents, in particular whether a ship's manifest without the master or officer responsible for the document being called to prove the document could be admitted in evidence. The trial judge there had admitted the ship's manifest as evidence apparently partly on the ground that the document was a public document. The Federal Court disagreed and held that the ship's manifest was inadmissible in evidence without the master or officer responsible for it being called to prove its contents but as it was a statement made by a person in the course of the business of the shipping company it would have been admissible if it was proved that the maker was dead, could not be found or had become incapable of giving evidence or whose attendance could not be procured without unreasonable delay or expense. As the condition precedent to the reception of the document had not been proved, the document was inadmissible.

In the instant case Kanya Kosicharom (PW2), the assistant manager of the Imperial Hotel, Bangkok stated that as assistant manager one of her duties was that of a co-ordinator for the sales and marketing department to the rooms division. She was directly responsible and answerable to the managing director. Her duties included keeping records of guests which were required to be kept for ten years by Thai law. Ladawal Kitiaprorn (PW25), who was the front office cashier of the Imperial Hotel Bangkok when shown ID46 and ID47 stated that ID46 was posted by him and he also prepared the visa card voucher to settle the bill for ID46 and ID47. It appeared quite clear to us in this case that the documents were made in the course of the business of the hotel. The makers of the documents were outside the jurisdiction and unwilling to come to this country. The documents were produced by persons responsible for their safekeeping.

In a situation like this where the documents were prepared in the course of business and the makers were outside the jurisdiction who refused or were unwilling to come to this country, all the court should need to satisfy the requirement of s 32(b) of the Evidence Act was that there was some evidence to show that the makers' attendance could not be procured without delay or expense which the court considered unreasonable under the circumstances.

We have examined the evidence of DSP Ramalingam (PW24) who went to Bangkok during the trial to investigate into the initials 'CW' and 'OIL' in ID46 and ID48. He categorically stated that the maker of the documents refused to come to this country and there was nothing one could do about it.

In our view the learned judge was correct in admitting those documents. Such documents are receivable as an exception based on the principle of necessity. Because the entries were made in the course of business there is a presumption that they had been done with disinterested motive and can therefore be taken to be generally true. See also *Sarkar on Evidence* (12th Ed) p 365.

At the close of the prosecution's case we agreed with the learned judge that there was sufficient evidence to justify the judge to call for the defence in respect of the first, second, third, fourth and fifth appellants. The presumption in s 37(d) of the Act was properly invoked because the drugs were found in the suitcases in the custody and control of the respective appellants.

As regards the seventh, eighth and ninth appellants, looking at the totality of the evidence of the prosecution, there was sufficient evidence of close interactions and positive acts between the first, second, third, fourth and fifth appellants and the seventh, eighth and ninth appellants to constitute the offence of abetment required under s 33 of the Act. There was evidence that the seventh appellant stayed with the first appellant and the fourth appellant at the Bangkok Palace Hotel and the room bill was settled by the eighth appellant. The seventh appellant stayed at the Mandarin Hotel with the fifth, eighth and ninth appellants. On 29 October 1982 the seventh appellant flew to Penang with the eighth and ninth appellants where they stayed at Hotel Malaysia and the bill was settled by the ninth appellant. While in Penang the seventh appellant made the fateful flight arrangement to Brussels via Singapore for the first, second, third, fourth and fifth appellants. The eighth appellant by his American Express card paid for the fare as arranged by the ninth

appellant. In our view the learned judge was correct in calling for the defence of the seventh, eighth and ninth appellants at the close of the prosecution case.

As regards the sixth appellant, there was in our view insufficient evidence of abetment at the close of the prosecution's case. In the words of the learned judge himself when he decided what sentence to impose on the sixth appellant he found that the only involvement of the sixth appellant in this case was to escort the first and second appellants from Haadyai to Penang and stayed with them in the same hotel. The photographs and the evidence of interactions may give rise to some suspicion as to the role of the sixth appellant but suspicion alone is not enough to constitute an offence of abetment. In our view the learned judge should not have called for his defence. We agreed with the learned judge that the evidence of the appellants did not raise a reasonable doubt on the prosecution's case.

The presumption of s 37(d) of the Act had not been rebutted by the first, second, third, fourth and fifth appellants. It is reasonable to infer that the secret compartments in the suitcases they were carrying were to their knowledge. It is also reasonable to infer that the weight of the drugs in the suitcases could not have gone unnoticed by the persons having control and custody of the suitcases.

All the five suitcases would appear to be identical in shape, size and make. The secret compartments were expertly made to avoid detection and from the photographs exhibited they were made in similar fashion. The drugs of approximately the same quantity were laid out in similar manner in the five suitcases. All these in our view would tend to show that it was a well-planned operation to move the drugs out of the country.

Accordingly we upheld the convictions of the first, second, third, fourth and fifth appellants. As regards the sentences passed on them the principles already established by this court ought to be upheld and indeed followed by the learned judge in this case. We therefore saw no reason to interfere with the sentences imposed.

As regards the seventh, eighth and ninth appellants we held that on the evidence considered in its totality the learned judge was correct in drawing the necessary inferences that the appellants abetted the offence of trafficking in drugs. It was a well-planned operation. We upheld the convictions and on the same principles referred to earlier we also upheld the sentences passed on them.

Accordingly the appeals against conviction and sentence were dismissed in respect of the first, second, third, fourth, fifth, seventh, eighth and ninth appellants. The sixth appellant was acquitted and discharged. The appeal by the public prosecutor against the inadequacy of sentence imposed on the sixth appellant was also dismissed.

Appeals of first to fifth and seventh to ninth appellants dismissed.
Appeal of sixth appellant allowed.

Solicitors: *Kumar, Sitham & Co; Karpal Singh & Co; R Rajasingam & Co.*

Reported by *Prof Ahmad Ibrahim*

Mohd Zainal Abidin bin Abdul Mutalib v Dato Seri Dr Mahathir bin Mohamed, Minister of Home Affairs, Malaysia and Anor

SUPREME COURT (KUALA LUMPUR) - CIVIL APPEAL NO 158 OF 1988
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED YUSOFF AND GUNN CHIT TUAN SCJJ
6 JULY 1989

Administrative Law - Application for certiorari to quash decision of Minister of Home Affairs - Minister confirming decision of Registrar of Societies - Duty of Registrar - No evidence of bad faith on part of Registrar or Minister of Home Affairs - Appeal heard by Minister - Opportunity to be heard - Doctrine of necessity - Societies Act, ss 12(3), 13(1), (2), 18 & 41(C)

Societies - Decision of Registrar of Societies cancelling the registration of society - Appeal to Minister of Home Affairs - Application for certiorari - Societies Act 1966, ss 12(3), 13(1), 18 & 41(C)

This was an application for an order of certiorari to quash the decision of the Minister of Home Affairs under s 18 of the Societies Act 1966. The Minister had heard an appeal from the Registrar of Societies and he confirmed the decision of the Registrar under s 13(1) of the Societies Act cancelling the registration of UMNO. In cancelling the registration the Registrar relied on the order of the High Court reported in [1988] 2 MLJ 129 declaring that UMNO had become an unlawful society based on what was agreed to in the High Court then that there were 30 unapproved branches. The decision of the High Court was upheld in the Supreme Court - see [1988] 3 MLJ 82. The application for certiorari was dismissed in the High Court and the appellant appealed.

Held, dismissing the appeal:

(1) The Registrar of Societies had in this case duly complied with the law by notifying the secretary-general of the society and copying the notification to the president and the treasurer. He cancelled the registration of the society on receipt of the reply from the person addressed to in the notice.

(2) There was no bad faith on the part of the Registrar as there was already a court order to the effect that UMNO was an unlawful society. Bad faith could not be imparted to the Registrar solely by not investigating after receiving the reply from the secretary-general of the society. The cancellation of the registration was proceeded with quickly to comply with the order of the court and this should not be construed as evidence of bad faith.

(3) In view of the grounds of appeal contained in the letter of the appellant addressed to the Minister there was in effect